

DECISION



Kent's Baker
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

7883

FILE: B-191657

DATE: October 3, 1978

MATTER OF: Peck Iron and Metal Co.

DIGEST:

1. Protest received by the contracting agency the day before bid opening was timely filed. Even though protest submitted with bid is not considered as filed before bid opening, this was not such a case because the envelope containing protest did not contain the required designation as a "bid" and was not sent to bidding address.
2. Sales Invitation for Bids (IFB) clearly designated certain quantities of armor and steel plate to be retained by the Government. A second provision, which specified damages for failure to prepare and deliver a quantity of metal less than that specified by the Government retention clause, did not create an ambiguity because the contractor was clearly obligated to return all quantities of metal specified to be retained by the Government irrespective of damages to be assessed.
3. Assertion that Government will encounter problems regarding the designation of government-retained property, even though the solicitation is unambiguous, is a matter of contract administration and is not for resolution under GAO Bid Protest Procedures.
4. Although record is inconclusive as to whether agency was notified of protest to General Accounting Office prior to award of contract, protester was not prejudiced by award which was validly made to high bidder under a valid sales solicitation.

Peck Iron and Metal Company (Peck) protests any award under Sales Invitation for Bids (IFB) 16-8007, issued by the Defense Property Disposal Ship Sales Office, Portsmouth, Rhode Island. The IFB, which requested bids for the purchase of a surplus aircraft carrier, designated

certain quantities of armor and steel plate which were to remain Government property and specified damages if certain lesser quantities of these items were not removed, cut and delivered to the Government. The protester asserts that these provisions were ambiguous.

The agency asserts that Peck's protest to this Office was untimely because the agency reasonably mistook the envelope containing the initial protest to the agency to be a bid and did not open the envelope until the scheduled bid opening time. The Bid Protest Procedures of this Office state that:

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals." 4 C.F.R. 20.2(b)(1) (1977).

The term "filed" means "receipt in the contracting agency or in the General Accounting Office as the case may be." 4 C.F.R. 20.2(b)(3).

Peck first protested the alleged ambiguity in the IFB to the agency, in a letter received by the agency sales office on March 30, 1978, the day before bid opening. The agency contends that, even though Peck's protest was physically received in the agency on the day before bid opening, the agency reasonably believed the envelope containing the protest was a bid and therefore did not open it prior to the scheduled bid opening date.

This Office has held that a protest required to be filed prior to bid opening is not timely if it is filed with the bid package. Emerson Electric Co., B-184346, September 9, 1975, 75-2 CPD 141. Here, the protester did not file a protest with a bid package. Rather, the protester submitted a protest in an envelope marked with the solicitation number, the opening date and the protester's bidder identification number. The Agency asserts that it

reasonably mistook this correspondence to be a bid. However, the IFB required that bid envelopes be marked "Bid" and be mailed to a designated Post Office Box. In this case the protest was mailed directly to the contracting officer rather than to the bidding address in the solicitation and the envelope was not marked "Bid." Consequently, we find that Peck's protest, which was filed before bid opening and otherwise meets the timeliness requirements of our Bid Protest Procedures is timely and is for consideration on the merits.

Peck asserts that the IFB was ambiguous because the clause designating for retention certain government-owned armor and steel plate stated a greater quantity of such property than did the related provisions under which damages were to be assessed for shortages in returned government property. Page nine of the IFB provides:

"NOTE: THE FOLLOWING ITEMS OF ARMOR AND STEEL PLATE ONBOARD THE VESSEL ARE DESIGNATED AND SHALL REMAIN GOVERNMENT PROPERTY TO BE REMOVED AND CUT INTO SIZES OF THE DIMENSIONS STATED BELOW FOR THE GOVERNMENT BY THE PURCHASER IN ACCORDANCE WITH ARTICLE EM 'STRIPPING GOVERNMENT PROPERTY FROM THE VESSEL'.

- | | |
|-----------|---------------|
| a) 3 1/2" | 1000 Long Ton |
| b) 6.3" | 483 Long Ton" |

The IFB then specified the locations of the 1000 long tons of 3 1/2" thick protective deck plating and the 483 long tons of 6.3" thick armor bulkheads. The IFB explained that the armor and steel plating listed above represented the quantity originally purchased for the construction of the vessel and did not reflect amounts lost from shaping and fitting the material during ship construction or any loss from subsequent ship alteration or repair.

Table A, in the IFB stated as follows:

"TABLE A - Plating to be Returned to Government

**Armor Plate: Item 1: 650 Long Tons, Sub Item a
410 Long Tons, Sub Item b"**

Table B specified the price per ton that would be charged for a shortage in the quantity of metal delivered by the contractor. The IFB explained that:

"If the purchaser fails to recover and deliver to the Government the quantity stated in Table A, the contract price will be adjusted upward for the value of material not delivered at the rate prescribed in Table B and the purchaser will pay to the Government the net amount of any such adjustment: provided however, that no charge will be made pursuant to this provision to the extent that such failure is due solely to the nonexistence of armor or steel plating in the designated location(s)."

The agency contends that a bidder can determine from the above provisions the amount of steel and armor plating to be returned to the Government and the consequences of not returning the stated amount.

We do not agree with the protester that, in order for the bidder to understand its responsibilities under the contract, the quantity of armor and steel plate designated as government property had to be the same as the quantity of armor and steel plate specified as the basis for assessing damages. The IFB states that the quantity designated as Government property represents the quantity of armor and steel plate originally purchased for the construction of the vessel. It was not unreasonable for the Government to designate this entire quantity of metal as property to be retained by the Government, even though some of the metal had been lost from shaping and fitting the material during ship construction and from subsequent ship alteration and repair. The description of the locations and original quantities of sheet metal and armor made it clear that any of the designated metal remaining on board was government property.

The provisions designating a lesser quantity of metal as the basis for assessing damages did not create an ambiguity. The quantities specified in those provisions should reasonably be interpreted to be the Government's estimate of how much metal actually existed on the ship, as opposed to how much was utilized in its construction. The record does not support the protester's contention that the Government had the authority or intention to waive, without consideration, any claim to quantities of metal in excess of those specified in Table A. The sales IFB clearly stated that the contractor was responsible for preparing and returning the entire quantity specified as property retained by the Government. The protester has repeatedly asserted precisely this interpretation in its submissions to this Office. Consequently, we conclude that the provisions cited by the protester were not ambiguous.

The protester also asserts that the contract provision for reserving metal as government property in ship sales contracts has "uniformly proved to be unenforceable and inoperative." The protester submitted a series of memoranda prepared within the agency, which the protester contends support its contention that the ship sales solicitation was ambiguous. The agency has pointed out that the documents which the protester submitted address the problems which develop when plating originally designated to be prepared for Government use is not in fact required for Government use. Such problems are distinguishable from the alleged ambiguity in the sales contract regarding what items are reserved as Government property.

In response, the protester submitted contract amendments and intra-agency memoranda dated between July 21, 1966, and January 21, 1969, which it asserts support its contention that the sales contract provision regarding government-retained property is ambiguous. However, the second group of documents submitted by the protester relate to problems which were encountered when the agency misdescribed the thickness of metal designated as Government property. The documents submitted do not support the protester's contention that a designation of one quantity of metal as the amount retained by the Government and

the designation of a lesser quantity as the amount upon which damages were based caused the sales IFB to be ambiguous.

To the extent that the protester is asserting that, even if the solicitation is unambiguous as to the contractor's liability, the agency will encounter problems regarding the thickness of metal actually existing on the ship, this is a matter of contract administration. Matters of contract administration are not for resolution under our Bid Protest Procedures, 4 C.F.R. Part 20 (1978), which are reserved for considering whether an award or proposed award of a contract complies with statutory, regulatory and other legal requirements. Julian A. McDermott Corporation, B-187705, B-188197, April 18, 1977, 77-1 CFD 266.

The protester finally asserts that the agency acted contrary to 4 C.F.R. 20.4, which provides that when a protest has been filed before award, the agency will not make an award prior to resolution of the protest except as provided in the applicable procurement regulations. Here, the protest to the agency was resolved by a letter from the agency denying the protest, dated April 10, 1978, the day before award was made. The protest to GAO was filed in the afternoon of April 10, 1978, and we notified the agency of the protest the following day, on which date the award was made. From the record before us we are unable to determine whether the contracting officer knew of the protest to GAO before or after award was made. In any event we do not agree with the protester's objections to the solicitation and cannot object to an award on the basis of that solicitation.

Accordingly, the protest is denied.


Deputy Comptroller General.
of the United States